No. 86-766

In the Supreme Court of the United States

OCTOBER TERM, 1986

AIRLINES TRANSPORTATION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board properly found that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging an employee for asserting his collectively bargained right to take a lunch break.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. The decision and order of the National Labor Relations Board (App., *infra,* 1a-5a), including the decision of the administrative law judge (Pet. Ap. 3a-29a), are reported at 277 N.L.R.B. No. 37.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2a) was entered on August 7, 1986. The petition for a writ of certiorari was filed on November 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Airlines Transportation Company, operates a limousine service that transports passengers between various locations in Pittsburgh and the Pittsburgh airport (Pet. App. 4a). During the relevant time period,

the collective bargaining agreement that petitioner had negotiated with its limousine drivers' collective bargaining representative, Local 128, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union"), provided that " 'employees *will have* a non-paid one-half (1/2) hour lunch period to be taken between the fourth and sixth hours of work' " (App., *infra,* 3a (emphasis in original)). Petitioner had sometimes asked its drivers to work through all or part of this lunch period for additional pay (Pet. App. 5a-6a), but the drivers were entitled to refuse the request and to take the lunch break provided by the contract (*id.* at 6a-7a).

On November 6, 1981, one of petitioner's drivers, Paul Conway, began work at 1:15 p.m. and was therefore entitled to take a 30-minute lunch break between 5:15 p.m. and 7:15 p.m. (Pet. App. 7a). At 5:45 p.m., Conway arrived at the Sheraton South Hotel in Pittsburgh to pick up a scheduled passenger (*ibid.*). He could not find the passenger, so he called the dispatcher, at about 6:05 p.m, and told him that the passenger was a "no-show" (*ibid.*). The dispatcher instructed Conway to return to the airport (*ibid.*). When Conway returned to his limousine, however, he discovered that the passenger finally had arrived (*ibid.*). The passenger requested that Conway wait a few minutes so that he could finish his dinner, which Conway agreed to do (*ibid.*). While waiting for the passenger, Conway made a phone call (*ibid.*). When the passenger finished his dinner, Conway drove him to the airport, arriving at approximately 6:55 p.m. (*id.* at 8a).

Shortly after Conway arrived, the dispatcher, John Koehler, asked him to drive a group of passengers to the hotel at 7:00 p.m. (Pet. App. 8a). Conway refused to do so, stating that, " 'I'd like my lunch hour' " (App., *infra,* 3a (emphasis deleted from original)). Keohler protested that the passengers would have to take a taxicab to the hotel if

Conway did not drive them (*ibid.*), to which Conway replied, " 'Do what you want with them, cab them or helicopter or whatever, *I'd like my lunch hour, I'm due for lunch*' " (*ibid.* (emphasis in NLRB Decision)). He added that, if he waived his lunch period, his final trip would entail overtime and, given that other drivers were on lay-off, he did not like having to work overtime (Pet. App. 8a).

Fifteen minutes later, while Conway was still on his lunch break, the supervisory dispatcher, John Colosimo, approached him and requested that he take the passengers to the hotel (App., *infra,* 3a). Conway again refused, reiterating that he "*wanted [his] lunch hour because the contract says that it's due between four and six hours*" (*ibid.* (emphasis in NLRB Decision)). By the time Conway finished his lunch break, the passengers were no longer there (Pet. app. 9a). Accordingly, the dispatcher sent him back to the hotel to make the 8:00 p.m. return trip to the airport (*ibid.*).

Three days later, petitioner suspended Conway for taking the lunch break and for refusing to make the requested trip (Pet. App. 9a). Then, on November 12, 1981, after meeting with Conway and representatives of the Union, petitioner formally discharged him (*id.* at 10a-12a).

2. Conway filed an unfair labor practice charge with the National Labor Relations Board ("Board") (Pet. App. 3a). The Board held that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by discharging Conway for engaging in the "protected," "concerted activity" of insisting on his contractual right to take a lunch break (App., *infra,* 1a-5a). Relying on this Court's decision in *NLRB* v. *City Disposal Systems, Inc.*, 465 U.S. 822 (1984),[1]

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[1] An administrative law judge ("ALJ") initially determined that Conway was protesting on behalf of all of petitioner's drivers the fact that he was doing work of laid-off employees and that his discharge was unlawful under the rationale of *Mushroom Transportation Co.* v.

the Board noted that, "[t]o establish concertedness * * *, it is sufficient that an employee complaint communicate a reasonably perceived violation of a collective-bargaining agreement" (App., *infra,* 4a). It further found that, "[w]here, as here, the employee makes explicit reference to the contractual provision supporting his claim, there can be little question but that the employee is actively pursuing enforcement of that provision" (*ibid.*). Accordingly, "[i]n view of the protected character of this activity" (*ibid.* (footnote omitted)), and the fact "that this activity was the motivating factor in Conway's discharge" (*ibid.*), the Board held that petitioner's actions violated Section 8(a)(1) of the Act and ordered, *inter alia,* that petitioner offer Conway reinstatement and back pay (App., *infra,* 4a; see also Pet. App. 27a).

3. In an unpublished opinion, the court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-2a).

ARGUMENT

The Board's decision, upheld by the court of appeals, is correct. It is consistent with this Court's decision in *NLRB* v. *City Disposal Systems, supra,* and does not conflict with the decision of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. In *City Disposal,* this Court held that "the assertion by an individual * * * of a right grounded in a collective-bargaining agreement" may constitute "concerted activity" (465 U.S. at 825 (footnote omitted)), "[a]s long as the employee's statement or action is based on a reasonable and honest belief that he is being, or had been, asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or ac-

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NLRB, 300 F.2d 836 (3d Cir. 1964). See Pet. App. 22a-23a. This Court subsequently decided the *City Disposal* case, however, and the Board did not rely on the ALJ's rationale in forming its judgment. See App., *infra,* 2a.

tion is reasonably directed toward the enforcement of a collectively bargained right" (*id.* at 837). Here, the Board, affirmed by the court of appeals, found that Conway had made such an assertion. See App., *infra,* 3a-4a. Specifically, the Board found that Conway told petitioner's officials that "[t]he contract says that I'm due for lunch" (*id.* at 3a), that Conway "reasonably perceived" that these officials' actions constituted a "violation of [the] collective-bargaining agreement" (*id.* at 4a), and that Conway was "pursuing enforcement of [the contract] provision" when he made "explicit reference to [it]" (*ibid.*). This Court has indicated that it will not reexamine such factual findings after they have been affirmed by a court of appeals. See *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951). Accordingly, "there is no justification for overturning the Board's judgment that the employee [was] engaged in concerted activity" (*NLRB* v. *City Disposal Systems,* 465 U.S. at 837).

2. In any event, petitioner's contention (Pet. 10-13) that Conway's action was "unreasonable" and thus not "concerted" is meritless. While Conway did take time at the hotel to make a personal phone call, he did so while he was waiting for a passenger to finish dinner; thus, Conway did not, as petitioner asserts (Pet. 10-11), have sufficient time both to take a lunch break and to be ready for a 7:00 p.m. trip. Furthermore, while Conway did say (Pet. 11-12) that he would not waive his lunch break because other drivers were on layoff, the Act clearly protects a single employee's invocation of collectively bargained rights "regardless of whether the employee has his own interests most immediately in mind" (*City Disposal,* 465 U.S. at 830). Finally, there is absolutely nothing in the record to support petitioner's claim (Pet. 13) that Conway was setting the stage for an "early quit"; the record shows only that Conway was between his fourth and sixth hours of

work and that he wanted his lunch break. Thus, even if this Court were inclined to reexamine the Board's findings, the Board's judgment is supported by the record here.

3. There is likewise no merit to petitioner's contention (Pet. 14-17) that Conway's action was not "protected" by Section 7 of the Act because it constituted an unauthorized "work stoppage." Cf. *City Disposal,* 465 U.S. at 837 ("[i]n general, if an employee violates [a no-strike] provision, his activity is unprotected even though it may be concerted"). Conway did not breach any "no-strike" clause or any other provision of petitioner's contract with the Union. Rather, he exercised his contractual right to take his lunch break *and* to refuse his employer's request that he work through it. See Pet. App. 6a-7a. Thus, as the Board explained in *General Motors Corp.,* 261 N.L.R.B. 516, 519 (1982) (cited by the Board here, see App., *infra,* 4a n.4), Conway "was not refusing to work in protest of a working condition, but was asserting a right to leave for a specific purpose explicitly covered by contract provisions." That is not a "work stoppage," but rather a "protected" activity under the Act. See *City Disposal System, Inc.,* v. *NLRB,* 766 F.2d 969, 974 (6th Cir. 1985) (on remand from this Court, court of appeals finds that employee had contractual right to refuse to drive a truck that he believed was unsafe and thus was engaging in "protected" activity).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DECEMBER 1986

APPENDIX A

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 6–CA–15129

AIRLINES TRANSPORTATION COMPANY

AND

PAUL CONWAY, AN INDIVIDUAL

DECISION AND ORDER

On 15 March 1983 Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions for the reasons set forth below and to adopt the recommended Order.

As more fully set forth in the attached decision, the judge found, and we agree, that the Respondent violated Section 8(a)(1) by discharging Paul L. Conway from his

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[1] The Respondent has exceped to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

job as airport limousine driver for engaging in protected concerted activity. The judge found that on 6 November 1981[2] Conway insisted on taking his full lunchbreak in order to make the point to management that drivers were doing the work of four men who had been laid off during the air traffic controllers' strike. The judge concluded that this protest was related to group action in the interest of all the drivers and that, in discharging Conway, management recognized it as such. The judge held that the Respondent violated Section 8(a)(1) by discharging Conway for engaging in concerted activity for the purpose of mutual aid or protection. We find a more compelling rationale for the judge's conclusion grounded in the Board's *Interboro*[3] doctrine, approved by the Supreme Court in *NLRB v. City Disposal Systems,* 104 S.Ct. 1505 (1984).

In *City Disposal*, which issued after the judge's decision in this case, the Court held that an employee's "honest and reasonable invocation" of a collectively bargained right is concerted activity. In so holding, the Court recognized that, although the processing of a grievance is the principal means for invoking rights conferred through collective bargaining.

> [i]n practice . . . there is unlikely to be a bright-line distinction between an incipient grievance, a complaint to an employer, and perhaps even an employee's initial refusal to perform a certain job that he believes he has no duty to perform. It is reasonable to expect that an employee's first response to a situation that he believes violates his collective bargaining agreement will be a protest to his employer. [Id. 104 S.Ct. 1513-1514.]

Article IV of the collective-bargaining agreement covering the Respondent's limousine drivers provides, inter alia,

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[2] All dates are in 1981.

[3] *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

that "employees *will have* a non-paid one-half (½) hour lunch period to be taken between the fourth and sixth hours of work." (Emphasis added.) Describing his arrival at the airport at 6:55 p.m., his sixth hour of work, Conway credibly testified about his conversation with dispatcher John Koehler as follows:

> As I approached the phone John came around the corner and I told him I had one passenger. And then John said he wanted me to make the seven o'clock pull back to Mt. Lebanon, back to Sheraton South and I asked John I said, "No, *I'd like my lunch hour.*" and Koehler says, "I have some people over there, I'll have to cab them." And I said, "Do what you want with them, cab them or helicopter or whatever, *I'd like my lunch hour, I'm due for lunch.*" The contract says that I'm due for lunch between the fourth and sixth hours, and it was getting near the end of my sixth hour and I hadn't even started lunch. [Emphasis added.]

Conway proceeded to relate to Koehler his displeasure that he and other drivers were being pressured to work overtime during a period of employee layoffs. Conway explained that, had he waived his lunch period as the dispatcher had urged, his final trip of the day would have entailed overtime, which the Respondent concedes was not mandatory for drivers.

Supervisory Dispatcher John Colosimo approached Conway about halfway through his lunch period and again requested that he resume driving. Conway testified that his response was "that I didn't feel that I should do this with men laid off because *I wanted my lunch hour because the contract says that it's due between four and six hours.*" (Emphasis added.) During an investigative interview 6 days later, Conway was asked what point he was trying to make by insisting on lunch. When he responded, "I don't feel we should have to work overtime when men are laid

off," company President Jones Sinnot told him, "You've proved your point. You no longer work for this Company." Teamsters Local 128 President William Carson, present at the meeting, reminded Sinnott of Conway's contractual entitlement to his lunchbreak. Sinnott resolved, however, to proceed with the discharge. Subsequently, in a letter to Carson, the Respondent specifically referred to Conway's insistence on his lunch hour in stating the grounds for discharge.

To establish concertedness under *City Disposal*, it is sufficient that an employee complaint communicate a reasonably perceived violation of a collective-bargaining agreement. Where, as here, the employee makes explicit reference to the contractual provision supporting his claim, there can be little question but that the employee is actively pursuing enforcement of that provision. In view of the protected character of this activity,[4] and in further view of the judge's findings, which we adopt, that this activity was the motivating factor in Conway's discharge, we find that Respondent's action violated Section 8(a)(1).[5]

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[4] See *Bunney Bros. Construction Co.*, 139 NLRB 1516, 1519 (1962); *General Motors Corp.*, 261 NLRB 516 (1982).

[5] Consistent with the judge's decision, we find it unnecessary, in light of the 8(a)(1) finding, to pass on the related 8(a)(3) allegations of the complaint.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Airline Transportation Company, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. 8 November 1985

Donald L. Dotson, Chairman

Patricia Diaz Dennis, Member

Wilford W. Johansen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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